IN THE

Supreme Court of the United States

October Term, 1978

No. 78-169

MILLIKEN & COMPANY,

Petitioner,

v.

FEDERAL TRADE COMMISSION, *et al.*,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In its petition, Milliken & Company showed that the Court of Appeals ignored the applicable precedents of this Court and a well reasoned decision of the Fifth Circuit when it concluded that Milliken's challenges to the FTC's LB and CPR programs were premature.

The FTC asserts (FTC Br. at 21) that judicial review is premature because it has not yet made a final decision to

publish either LB or CPR data, and that there are substantial uses it can make of those data without publication. These assertions are belied both by the record and by logic.

The record demonstrates that the FTC and its staff have publicly said eight times that they are collecting LB data because they intend to publish them.[1] They have made similar statements about the CPR program on at least three occasions.[2] The FTC's protestations that it has not finally decided to publish are thus a matter of litigation convenience, and are not substantiated by the FTC's own official, public acts.

Furthermore, any use the FTC might make of Milliken's LB data, *even use within the Commission,* must comply with the LB confidentiality rules contained in statute and regulation.[3] Those rules govern the use of LB data by *any* person (except certain statistical and data processors on the FTC staff). Thus, if the FTC intends to utilize LB

1. Resolution Requiring Annual Line of Business Reports from Corporations (Court of Appeals LB Appendix ("LBA") at 466); 1973 Form LB (LBA 2452); Supporting Statement of FTC Staff for 1973 Form LB (LBA 367); Denial of Motions to Quash 1973 Form LB (LBA 486-494); Denial of Renewed Motions to Quash 1973 Form LB (LBA 555 et seq., esp. 557-58); Bureau of Economics Staff Statement about Proposed 1974 Form LB (LBA 2229, 2307-08); Statement to Comptroller General in Support of 1974 Form LB (LBA 720); Denial of Motions to Quash 1974 Form LB (LBA 877-96).

2. Statement to Comptroller General in Support of CPR Form (Court of Appeals CPR Appendix ("CPRA") 256, esp. 257, 263); Staff letter to GAO (CPRA 281, 285-86); Statement of the Commission Concerning Confidentiality (CPRA 303).

3. Appropriations Acts, 88 Stat. 1822, 1841 (1974); 89 Stat. 611, 634-35 (1975); 90 Stat. 937, 956 (1976); Confidentiality Rules, 39 Fed. Reg. 30970 (1974); 40 Fed. Reg. 21542 (1975); 40 Fed. Reg. 42243 (1975); 41 Fed. Reg. 28041 (1976).

data for any purpose, such as investigation or economic study, even if that use is "internal" to the FTC and its staff, the FTC will be required to comply with the confidentiality rules, *i.e.*, to "publish" the data (Milliken Petition at 12 & n.6; 19 & n.11).

Similarly, unless the FTC intends to publish individual company CPR data, it cannot justify collecting them, because it can get any other data it needs from the Census Bureau (Milliken Petition at 10-11; 19 & n.11).

Thus, the FTC's own statements, as well as the inherent nature of each program, establishes that the FTC is collecting these data because it intends to publish them. No case stands for the proposition that when publication is the *raison d'être* of a program, judicial review of publication is premature when raised as a challenge to collection.[4] Indeed, the principles of *Service* v. *Dulles*, 354 U.S. 363 (1957), and *Vitarelli* v. *Senton*, 359 U.S. 535 (1959)—that the validity of any agency's act must be determined in light of its own stated purpose—compel the opposite result.

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4. The Commission cites two cases which it contends support this proposition. Neither does. In *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976), the Court of Appeals had decided that the record failed to support the FPC's decision. This Court held that the Court of Appeals had erred in specifying the time, manner and place at which the FPC was to take additional evidence to supplement the record. Thus, that case dealt with the court's interference with the FPC's procedures and processes.

In the case at bar Milliken has demonstrated as a matter of substantive law that because the only possible reason for collection is publication, the only way to determine if the FTC has acted properly in deciding to collect Milliken's data is to consider if the FTC can publish them.

The FTC also cites *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 438 (1938). As we explained in our petition (Milliken Petition at 19), this case is inapposite because it deals with an investigative subpoena which obtained data that lawfully could be used internally by the SEC without subsequent publication.

Finally, the FTC asserts that Milliken still has an adequate administrative remedy by which it can challenge publication. The FTC therefore contends that the Court of Appeals' decision in this case does not conflict with the Fifth Circuit's decision in *Genuine Parts Co.* v. *FTC*, 445 F.2d 1382 (5th Cir. 1971). Whatever the "adequacy" (or futility) of Milliken's remaining administrative remedies, if any, the fact remains they were not published in the Federal Register. Thus, the District of Columbia Circuit's decision emasculates the Federal Register Act, 5 U.S.C. §552(a)(1) and conflicts with *Genuine Parts*.[5]

In short, the FTC has failed to demonstrate any reason why this Court should not grant a writ of certiorari.[6]

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5. The FTC also contends Milliken has never requested notice of the FTC's intention to publish its data. The reason, of course, is that under the FTC's own view the proper time to raise this question is when Milliken files its LB and CPR forms. This has not yet been done. Further, because Milliken has four times requested exclusion from these programs on the grounds that its data cannot be published, this claim is disingenuous. *Contrast* Supreme Court Rule 23(1)(c) (question presented in a petition for certiorari includes every subsidiary question fairly comprised therein).

6. As we explained in our petition, only the first two questions it presents are unique to Milliken (Milliken Pet. at 2 n.1, 3-4 n.3, 23 n.16). As to all of the other questions raised in Milliken's petition we believe the FTC has not adequately answered the reasons this Court should grant a writ of certiorari, which reasons were set forth in Milliken's petition for certiorari and in the petitions in 78-167 and 78-168, in greater detail. We understand that reply briefs will be filed in Nos. 78-167 and 78-168, and on these common issues Milliken's reply to the FTC is the same as that of the other corporate parties.

Conclusion

The importance of the questions presented is shown by the petition, the briefs, and even the FTC's opposition. This Court should grant the petition and issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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New York, New York

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